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Fourth report on responsibility of international organizations

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Addendum

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III. Responsibility of a State in connection with the act of an international organization

A. General remarks

53. According to article 1, paragraph 2, of the current draft articles:

> "The present draft articles also apply to the international responsibility of a State for the internationally wrongful act of an international organization."[78]

As the related commentary explains,[79] the inclusion of this subject within the scope of the current draft articles is intended to fill a gap that was deliberately left in the articles on the responsibility of States for internationally wrongful acts. Article 57 of the latter articles stated that they were "without prejudice to any question of the responsibility of an international organization, or of any State for the conduct of an international organization".[80]

54. Not all the questions that may affect the responsibility of a State in connection with the conduct of an international organization should be examined in the present context. For instance, questions relating to attribution of conduct to a State have already been covered in the articles on State responsibility. It would clearly be preferable not to consider them here again. Thus, if an issue arises as to whether a certain conduct is to be attributed to a State or to an international organization or to both, the current articles will provide criteria only for settling the question as to whether that conduct is to be attributed to an international organization, while the articles on State responsibility will say whether that same conduct is to be attributed or not to a State.

55. The pattern set by the articles on responsibility of States for internationally wrongful acts does not provide a chapter in which one could appropriately include questions concerning State responsibility in connection with the act of an international organization. In the current draft a new chapter has to be envisaged for this purpose. The placing of this chapter in part one of the draft would have the advantage of addressing those questions in the same part that already deals with similar issues, relating to the reverse case of the responsibility of an international organization in connection with the act of a State.[81] If the option here suggested is taken, the heading of part one, which currently reads, "The Internationally Wrongful Act of an International Organization" may have to be modified as a consequence of including some provisions concerning the responsibility of States in that part.

56. Most of the questions to be considered in the new chapter relate to cases in which the responsibility of a State may arise in connection with a wrongful act of an international organization. However, in certain cases the act of the organization is not necessarily wrongful. This also occurs with regard to matters considered in chapter IV of the current draft articles, which also covers the case of a State or an

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[78] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[79] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), chap. IV, sect. C, para. 54.

[80] Ibid., *Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1), chap. IV, sect. E.1, para. 76.

[81] Ibid., *Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

international organization coercing another entity into committing what would be, but for the coercion, an internationally wrongful act.

57. With regard to questions of the responsibility, if any, of States as members of an international organization for the wrongful act of the latter, the conclusions to be reached in relation to States would probably apply also to entities other than States that may also be members of the same organization. Should the draft articles to be adopted in this regard cover the latter members as well, the new chapter would extend beyond questions of responsibility of a State in connection with the act of an international organization. This could be done by referring to "members" instead of "States" in the relevant provisions; however, the current draft cannot deal also with the question of responsibility of entities other than States or international organizations. Insofar as members of an international organization other than States are themselves international organizations, another option could be to refer only to States in all the provisions of the new chapter and to write some specific, albeit parallel, provisions with regard to international organizations as members of other international organizations. The latter provisions could then be included in chapter IV. The current title of that chapter, which reads, "Responsibility of an international organization in connection with the act of a State or another international organization",[82] is wide enough to cover also the said provisions.

B. Aid or assistance, direction and control, and coercion by a State in the commission of an internationally wrongful act of an international organization

58. Chapter IV of part one of the articles on State responsibility[83] only covers cases of States that aid or assist another State in the commission of an internationally wrongful act, or direct and control another State in the commission of such an act, or else coerce another State to commit an act that would, but for the coercion, be an internationally wrongful act. It would be difficult to find reasons for ruling out that States may act similarly with regard to international organizations. It would likewise be difficult to assume that different rules should apply when, for instance, on the one hand, a State assists another State in the commission of an internationally wrongful act, such as the unlawful use of force, and, on the other hand, a State assists an international organization in doing the same.[84]

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[82] Ibid.

[83] Ibid., *Fifty-sixth Session, Supplement No. 10* and corrigendum (A/56/10 and Corr. 1), chap. IV, sect. E.1, para. 76.

[84] Several authors held, sometimes implicitly, that similar rules should apply to the relations between a State and another State and to those between a State and an international organization. B. Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by U.N. Peace-Keeping Forces", *Revue égyptienne de droit international*, vol. 32 (1976), p. 57 at p. 69, held that "the host State may bear international responsibility — in addition to the U.N. responsibility — for unlawful acts of the U.N. force if it commits an act of complicity in the aforesaid unlawful act, i.e., to instigate or facilitate its committal". P. Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, supra note 15, at pp. 468-469, referred to the case of a State putting its own territory at the disposal of an international organization in order to allow that organization to commit a breach of an international obligation. P. Sands, in P. Sands and P. Klein (eds.), *Bowett's Law of International Institutions* (London: Sweet & Maxwell, 2001), p. 524, and D. Sarooshi, *International Organizations and the Exercise of Sovereign Powers*, supra note 6, at pp. 63 and 104, considered the case of aid or assistance by a State in

59. One could apply by analogy to the case of assistance given by a State to an international organization in the commission of an internationally wrongful act a rule which is in substance identical to the one that was expressed in chapter IV on State responsibility with regard to the relations between States. The same goes for all the other cases mentioned in that chapter. However, it seems preferable to include in the current draft certain rules that are specifically designed to cover the case in which a State assists an organization in the commission of an internationally wrongful act and the other cases envisaged in chapter IV on State responsibility. This solution, although largely repetitive, would contribute to clarity. Moreover, if the draft includes a chapter on responsibility of a State in connection with the act of an international organization, it would be odd if no mention were made of the case of aid or assistance, or of direction and control by a State in the commission of an internationally wrongful act by an international organization. Nor would the reason for omitting the case of coercion by a State on an organization be easily understood.

60. In its most recent report to the General Assembly,[85] the Commission raised the question of whether provisions on aid or assistance, direction and control, and coercion by a State should be included in the current draft. The great majority of the comments expressed by States in the Sixth Committee gave an affirmative reply to this question.[86] The few States that were not favourable to the inclusion of provisions on these issues, accepted the idea of a "reference clause" to the corresponding provisions on State responsibility[87] or suggested a saving clause, with a reference in the commentary.[88] While the International Criminal Police Organization held that the current draft would not be "the right place" to deal with the case of a State "aiding or assisting or directing and controlling an international organization in the commission of an internationally wrongful act",[89] and the Commission of the European Union considered that the "existing rules on State responsibility may well be applied by analogy when a State does not aid or assist another State but an international organization to commit an international wrongful act",[90] the Organization for the Prohibition of Chemical Weapons and the World

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the commission of an internationally wrongful act by an international organization. M. Hirsch, *The Responsibility of International Organizations toward Third Parties* (Dordrecht/Boston/London: Nijhoff, 1995), p. 175, referred to the case that "a single member has in fact complete, or almost complete, control over the activities of the organization".

[85] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. III, sect. A, para. 26.

[86] Statements by China (A/C.6/60/SR.11, para. 52), Austria (ibid., para. 64), the Republic of Korea (ibid., para. 86), Italy (A/C.6/60/SR.12, para. 4), Belarus (ibid., paras. 49-50), the Russian Federation (ibid., para. 71), Romania (ibid., para. 77), Hungary (A/C.6/69/SR.13, para. 8), Denmark, also on behalf of Finland, Iceland, Norway and Sweden (ibid., para. 20), the Libyan Arab Jamahiriya (A/C.6/60/SR.19, para. 11) and Algeria (A/C.6/60/SR.20, para. 60).

[87] Spain stated that "[i]t might be sufficient to include a reference clause that would ensure the application, mutatis mutandis, of the rules already established under the articles on Responsibility of States for Internationally Wrongful Acts" (A/C.6/60/SR.13, para. 53).

[88] According to the statement made by France, "a saving clause accompanied by a commentary should be sufficient" (A/C.6/60/SR.11, para. 80). Israel held that "it might be appropriate to make some reference [...] in the commentary" (A/C.6/60/SR.16, para. 57).

[89] Letter of January 2006 from the General Counsel of the International Criminal Police Organization to the Legal Counsel of the United Nations, not yet published.

[90] Letter of 3 February 2006 from the Director General of the Legal Service of the Commission to the Legal Counsel of the United Nations, not yet published.

Health Organization expressed a view favourable to including provisions that are parallel to those contained in the articles on State responsibility.[91]

61. Some criticism of a general nature has been voiced with regard to articles 16 to 18 on State responsibility and to the parallel provisions of the current draft which consider aid or assistance, direction and control, and coercion on the part of an international organization.[92] Without going into the merits of that criticism, the need for coherence both with the articles on State responsibility and with those already included in the current draft suggests that, at the present stage, the wording of the model articles be modified only to the extent that is necessary to identify the cases that the proposed draft articles are intended to cover.

62. The State that aids or assists, or directs and controls, or coerces an international organization may or may not be a member State. Should it be a member State, the relevant conduct could not simply consist in participating in the decision-making process of the organization according to the pertinent rules of the organization. The influence which may amount to aid or assistance, direction and control, or coercion, has to be used by the State as a legal entity that is separate from the organization. This is not to say that, when acting within an organ of an international organization, a State may not commit an internationally wrongful act, or that, because of its conduct as a member, a State could not incur responsibility for an internationally wrongful act of the organization. The latter question will be considered later in the present report.[93]

63. Given the fact that, with regard to aid or assistance, direction and control, and coercion, there is no reason for distinguishing between the relations between a State and an international organization, on the one hand, and the relations between States, on the other, the articles to be drafted should closely follow the text of articles 16 to 18 on State responsibility. The headings need to be slightly modified in order to distinguish them from those which have been used in articles 12 to 14 of the current draft.[94] Article 19 on State responsibility contains a saving clause[95] which is not necessary to replicate in the present context. The following texts are here suggested:

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[91] Letters of 30 January from the Legal Adviser of the Organization for the Prohibition of Chemical Weapons to the Legal Counsel of the United Nations and 21 February 2006 from the Legal Counsel of the World Health Organization to the Legal Counsel of the United Nations, respectively, not yet published.

[92] Statement by Israel (A/C.6/60/SR.16, paras. 55-56). The criticism concerned the appropriateness "to limit a State's responsibility in situations of aid or assistance only to cases in which the act would be internationally wrongful if committed by that State".

[93] Infra, sect. III.D.

[94] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[95] Article 19 on the responsibility of States for internationally wrongful acts reads as follows: "This chapter is without prejudice to the international responsibility, under other provisions of these articles, of the State which commits the act in question, or of any other State".

Article 25

Aid or assistance by a State in the commission of an internationally wrongful act by an international organization

A State which aids or assists an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) The act would be internationally wrongful if committed by that State.

Article 26

Direction and control exercised by a State over the commission of an internationally wrongful act by an international organization

A State which directs and controls an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and

(b) the act would be internationally wrongful if committed by that State.

Article 27

Coercion of an international organization by a State

A State which coerces an international organization to commit an act is internationally responsible for that act if:

(a) The act would, but for the coercion, be an internationally wrongful act of that international organization; and

(b) That State does so with knowledge of the circumstances of the act.

C. Use by a State that is a member of an international organization of the separate personality of that organization

64. Article 15 of the current draft concerns the case in which an international organization takes a decision binding its members or makes a recommendation or gives an authorization to members for the commission of an act that implies a circumvention, on the part of that organization, of one of its international

obligations.[96] In this type of case the organization refrains from acting directly. It apparently does not infringe any of its obligations, but achieves the same result, taking advantage of the separate legal personality of its members for avoiding compliance. While article 15 elicited in the Sixth Committee a variety of comments,[97] most, if not all, of these comments did not query the basic assumption that an international organization may incur international responsibility because of what it requires member States to do.

65. In the Sixth Committee the delegation of Ireland noted that article 15 "did not cover the situation where the act of the member State would not have incurred international responsibility if committed by the international organization".[98] The delegation of Switzerland added that "States should not be able to hide behind the conduct of the international organization".[99] While chapter IV of the draft was not the appropriate place for considering the problem from the angle of the responsibility of member States, it is indeed reasonable to envisage in the draft also the reverse situation in which a State may incur international responsibility because, in order to avoid compliance with one of its international obligations, it requires an international organization to act in its stead. In the latter case the entity that makes use of the separate legal personality of another entity is a State.

66. The case examined in article 15 and the reverse case now under consideration acquire practical importance when the entity which is required to act could do so without committing a breach of one of its international obligations and its conduct would therefore be lawful. One example could be that of a State that is a party to a treaty which forbids the development of certain weapons and that indirectly acquires control of those weapons by making use of an international organization which is not bound by the treaty.

67. The role that a member State may have within the organs of an international organization would not justify attribution of responsibility to the State for the conduct of the organization: this would be tantamount to denying the separate legal personality of the organization. Should the obligation also cover conduct that the State may take as the member of an international organization, responsibility, if any, of the State in this context would be for breach of an international obligation through its own conduct, not for what the organization did. One can take as an example the obligation of not acquiring nuclear weapons that non-nuclear States have under the Treaty on the Non-Proliferation of Nuclear Weapons.[100] This type of obligation would then appear to include the prohibition for a State party to the Treaty to contribute to the acquisition of nuclear weapons by an international

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[96] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205.

[97] Statements by Ireland (A/C.6/60/SR.11, paras. 33-37), China (ibid., para. 51), Austria (ibid., paras. 61-62), France (ibid., para. 79), Japan (A/C.6/60/SR.12, para. 7), the Netherlands (ibid., paras. 15-18), the United States (ibid., paras. 26-28), Portugal (ibid., para. 35), Belarus (ibid., para. 50), the Russian Federation (ibid., paras. 68-69), Guatemala (ibid., para. 105), Hungary (A/C.6/60/SR.13, para. 7), Denmark, also on behalf of Finland, Iceland, Norway and Sweden (ibid., para. 19), Greece (ibid., paras. 26-28), Germany (ibid., para. 34), Switzerland (ibid., para. 45), Spain (ibid., para. 52), Poland (ibid., para. 59) and India (A/C.6/60/SR.18, para. 60). Comments on this question were also expressed by the observer of the European Communities (A/C.6/60/SR.12, paras. 13-14).

[98] A/C.6/60/SR.11, para. 33.

[99] A/C.6/60/SR.13, para. 45.

[100] United Nations, *Treaty Series*, vol. 729, No. 10405, p. 161.

organization of which the State was a member. Should, on the contrary, the obligation under a treaty be regarded as not covering conduct that States parties take as members of an organization, the conduct of a State within the organization would not as such cause responsibility of the State to arise. The responsibility of a State party to the treaty could be asserted only if it was held responsible for achieving, through the organization, a result that the treaty precludes.

68. While the case envisaged in article 15 and the reverse case under discussion here bear some similarities, it would be difficult to give weight to the same factors that article 15 considers relevant when one examines the question of the international responsibility of a State for the conduct of an international organization. For instance, it is not inconceivable, but it is unlikely, that a State be entitled to take a decision binding an organization or even to influence the conduct of the organization through a recommendation. The most likely case that may be relevant under the present perspective is that of a State acquiring certain international obligations with regard to some of its functions and then transferring those functions to an international organization. To return to the example of the non-proliferation of nuclear weapons, States that are bound by the Non-Proliferation Treaty could be held responsible if they established an international organization that acquired or developed nuclear weapons.

69. The European Court of Human Rights considered in some judgements the question as to whether States that are members of an international organization incurred responsibility for a breach of an obligation under the European Convention on Human Rights when those States had transferred certain sovereign functions to that organization. In *Waite and Kennedy v. Germany* the Court examined the question as to whether the right of access to justice had been unduly impaired by a State that granted immunity to the European Space Agency in relation to claims concerning employment. The Court said that:

> "where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution."[101]

The Court nevertheless concluded that, although access to German courts was precluded by the immunity given to the relevant organization, the "essence of the applicants' 'right to a court'" under the Convention was not impaired, in view of the "alternative means of legal process available" to them.[102]

70. In *Bosphorus Hava Yollary Turizm ve Ticaret Anonim Sirketi v. Ireland*, the European Court took a similar approach, but made the criterion of equivalence more

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[101] Judgement of 18 February 1999, *Reports of Judgments and Decisions*, 1999-I, p. 392 at p. 410, para. 67. A similar passage is contained in the unreported judgment of the same day in *Beer and Regan v. Germany*, para. 57. A more succinct version is in the judgement, again of the same day, in *Matthews v. United Kingdom*, *Reports of Judgments and Decisions*, 1999-I, p. 253 at p. 265, para. 32. The passage quoted in the text reflects the view that the European Commission of Human Rights had expressed in its decision of 9 February 1990 in *M. & Co. v. Germany*, *Decisions and Reports*, vol. 64, p. 138 at p. 145.

[102] *Reports of Judgments and Decisions*, 1999-I, p. 412, para. 73.

general. The application related to a State measure which had been taken for implementing an obligation stemming from a regulation of the European Community. The Court reiterated its view that a State could not free itself from its obligations under the European Convention by transferring functions to an international organization, because:

> "absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention: the guarantees of the Convention could be limited or excluded at will thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards (...). The State is considered to retain Convention liability in respect of treaty commitments subsequent to the entry into force of the Convention (...)."[103]

The Court held that what was required from States parties to the Convention was that the relevant organization protected "fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides".[104] If, as in the case in hand, an equivalent protection was granted, the State did not incur responsibility.

71. It is noteworthy that the Commission of the European Communities had taken the same view before the European Court of Human Rights when it said in its written observations in *DSR Senator Lines GmbH v. 15 Member States of the European Union* that:

> "While it may be true as a matter of principle that signatories to the Convention may not evade their obligations by transferring powers to independent international organizations, it does not follow that they can be held liable for the actions of those organizations in individual cases. In order to comply with their obligations under the Convention it is sufficient that they ensure the institution of an equivalent level of protection of fundamental rights within the organization in question."[105]

72. There is a significant body of literature which advocates the responsibility of member States when they "abuse the separate personality in order to commit illegal acts, or in order to evade their legal obligations".[106] As one author put it, "States should be prevented from creating an artifice with the intention of avoiding consequences which they would have to bear were they to carry out the activity, which they have assigned to the international organization, individually".[107] The emphasis is on the case of States establishing an international organization and entrusting it with functions in respect of which they are bound by obligations under international law while the organization is not so bound.[108] As the case of avoidance

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[103] Judgement of 30 June 2005, not yet reported, para. 154.

[104] Ibid., para. 155.

[105] Observations dated 1 March 2001, JURM (2000) 4030, para. 25. The European Court of Human Rights did not address the question in its judgement in the case.

[106] M. Hirsch, supra note 84, p. 179.

[107] K. Zemanek, in *Annuaire de l'Institut de droit international*, vol. 66-I (1995), p. 129.

[108] I. von Münch, *Das völkerrechtliche Delikt* (Frankfurt am Main: Keppler, 1963), p. 269, linked the responsibility of member States of an international organization to circumvention of their obligations through the use of the separate legal personality of that organization. I. Seidl-Hohenveldern, *Corporations in and under International Law* (Cambridge: Cambridge University Press, 1987), p. 121, maintained that:

of compliance with international obligations by transferring functions to an international organization is the same as the one that was envisaged in the instances of practice referred to in the previous paragraphs, it seems preferable to write a draft article that addresses that case. This option would not rule out other cases being treated in a similar way, by resorting to analogy.

73. In draft article 15 the verb "to circumvent" is used in order to describe the case in which an international organization incurs responsibility for avoiding compliance with one of its international obligations by adopting "a decision binding a member State or international organization to commit an act that would be internationally wrongful if committed by the former organization".[109] The term "circumvention" received some criticism in the Sixth Committee,[110] mainly because it appeared to be unclear, although the commentary attempted to explain that term, indicating in particular that no "specific intention of circumventing" was required.[111] In view of this criticism, it would be preferable to use different wording in the present context. A change of terminology does not raise questions of coherency in relation to draft article 15 because, as has been noted above, the cases in which an international organization would incur responsibility according to that article are different from those that are relevant for the draft article under discussion here.

74. While responsibility of members of an international organization may concern entities other than States, for the reasons expressed in paragraph 57, the draft that is here proposed only refers to States. Practice and literature point to the requirement that the act that implies avoidance of the international obligation should actually occur. Although, as has been noted above, the practical relevance of this case depends on the fact that the international organization is not bound by the obligation, this is certainly not a requirement and it may be preferable to say as much, as has been done in draft article 15, paragraph 3. The suggested heading attempts to follow the style of those of the previous draft articles in the chapter. The following text is therefore suggested:

"Just as a State cannot escape its responsibility under international law by entrusting to another legal person the fulfilment of its international obligations, the partner States of a common inter-State enterprise are jointly and severally responsible in international law for the acts of the enterprise". Similar views were expressed with regard to the relations between member States and international organizations by A. Di Blase, "Sulla responsabilità internazionale per attività dell'ONU", *Rivista di diritto internazionale*, vol. 57 (1974), p. 250 at pp. 271-276; P. Sands, supra note 84, p. 524; D. Sarooshi, supra note 6, p. 64. After examining the dictum of the European Court of Human Rights in *Waite and Kennedy v. Germany* mentioned above, I. Brownlie, "The Responsibility of States for the Acts of International Organizations", in M. Ragazzi (ed.), *International Responsibility Today. Essays in memory of Oscar Schachter* (Leiden/Boston: Nijhoff, 2005), p. 355 at p. 361, noted that, "whilst the context is that of human rights, the principle invoked would seem to be general in its application".

[109] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. VI, sect. C, para. 205. The text refers to paragraph 1; the same verb was used in paragraph 2, which considers the case in which an international organization authorizes a member, or recommends to a member, "to commit an act that would be internationally wrongful if committed" by that organization.

[110] See statements by the observer of the European Communities (A/C.6/60/SR.12, paras. 13-14), the Netherlands (ibid., paras. 15-18), the United States (ibid., paras. 26-28), Guatemala (ibid., para. 105), Hungary (A/C.6/60/SR.13, para. 7) and Greece (ibid., paras. 26-28).

[111] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), para. 206, para. 4 of the commentary on article 15.

Article 28

Use by a State that is a member of an international organization of the separate personality of that organization

1. A State that is a member of an international organization incurs international responsibility if:

(a) It avoids compliance with an international obligation relating to certain functions by transferring those functions to that organization; and

(b) The organization commits an act that, if taken by that State, would have implied non-compliance with that obligation.

2. Paragraph 1 applies whether or not the act in question is internationally wrongful for the international organization.

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D. Question of the responsibility of members of an international organization when that organization is responsible

75. Two affairs have highlighted the question whether States that are members of an international organization incur responsibility because they are members of an organization which commits an internationally wrongful act. Both affairs led to a number of judgements by municipal courts, one of them also to some arbitral awards. Although in neither instance was the focus on whether member States were responsible under international law, several remarks were addressed on this question; moreover, certain considerations of a general nature that were made in those decisions appear to be relevant also to issues of international responsibility.

76. The first case had its origin in a request for arbitration which was made by Westland Helicopters Ltd. against the Arab Organization for Industrialization (AOI) and the four States members of that organization (Egypt, Qatar, Saudi Arabia and the United Arab Emirates). The request was based on an arbitration clause in a contract that had been concluded between the company and AOI. The arbitration tribunal examined in an interim award the question of its own competence and that of the liability of the four member States for the acts of the organization. This award deserves relatively long quotations as it tried to make a case for the responsibility of member States. The arbitral tribunal's main points in this regard were the following:

> "A widespread theory, deriving from Roman law ('*Si quid universitati debetur, singulis non debetur, nec quod debet universitas singuli debent*': Digest 3, 4, 7, 1), excludes cumulative liability of a legal person and of the individuals which constitute it, these latter being party to none of the legal relations of the legal person. This notion, which could be deemed 'strict', cannot however be applied in the present case. [...] [T]he designation of an organization as 'legal person' and the attribution of an independent existence do not provide any basis for a conclusion as to whether or not those who compose it are bound by obligations undertaken by it." [112]
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> "In default by the four States of formal exclusion of their liability, third parties which have contracted with the AOI could legitimately count on their liability. This rule flows from general principles of law and from good faith." [113]
>
> "[...] the four States, in forming the AOI, did not intend wholly to disappear behind it, but rather to participate in the AOI as 'members with liability' (...)." [114]
>
> "[...] one must admit that in reality, in the circumstances of this case, the AOI is one with the States. At the same time as establishing the AOI, the Treaty set up the Higher Committee ('Joint Ministerial Higher Committee') composed of the competent Ministers of the four States, charged with the responsibility not only to approve the Basic Statute, and to set up a provisional Directorate, but furthermore to direct the general policy of the AOI, and Article 23 of the Basic Statute describes this Committee as the 'dominating authority'. There could be no clearer demonstration of this identification of the States with the AOI,

[112] Interim award of 5 April 1984, quoted from the English translation published in *International Law Reports*, vol. 80, p. 600, at p. 612.

[113] Ibid. p. 613.

[114] Ibid., p. 614.

> especially since Article 56 of the Statute specifies that in case of disagreement within the Committee, reference should be made to the Kings, Princes and Presidents of the States."[115]

After referring to the circumstances in which the agreement between AOI and the company had been concluded and noting that the member States "could not help but be aware of the implications of their actions",[116] the arbitral tribunal concluded:

> "If it is true that the four States are bound by the obligations entered into by the AOI, these four States are equally bound by the arbitration clause concluded by the AOI, since the obligations under substantive law cannot be dissociated from those which exist on the procedural level."[117]

The tribunal made a brief reference to international law when it put forward some "considerations of equity":

> "Equity, in common with the principles of international law, allows the corporate veil to be lifted, in order to protect third parties against an abuse which would be to their detriment (International Court of Justice, 5 February 1970, *Barcelona Traction*)."[118]

77. The arbitral award was set aside by the Court of Justice of Geneva at the request of Egypt and in relation to that State only.[119] In finding that the arbitral tribunal was incompetent, the Court of Justice dissented from

> "the conclusion of the Arbitral Tribunal that the AOI [was] in some way a general partnership (*société en nom collectif*) which the four States did not intend to hide behind but agreed to take part in as 'members with liability' (*membres responsables*). It is not clear what legal grounds the Arbitral Tribunal [had] for accepting that the AOI [was] a legal entity under international law and then assimilating it to a corporation under private law, recognized by national legislations and subject to the rules of these legislations."[120]

Westland Helicopters unsuccessfully appealed against this judgment to the Federal Supreme Court of Switzerland. The Supreme Court confirmed that the arbitration clause did not bind Egypt and said:

> "The predominant role played by [the member] States and the fact that the supreme authority of the AOI is a Higher Committee composed of ministers cannot undermine the independence and personality of the Organization, nor lead to the conclusion that when organs of the AOI deal with third parties they *ipso facto* bind the founding States. [...] The fact that the AOI's status derives

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[115] Ibid., pp. 614-615.
[116] Ibid., p. 615.
[117] Ibid., p. 615.
[118] Ibid., p. 616.
[119] Judgment of 23 October 1987, published in English translation in *International Law Reports*, vol. 80, p. 622.
[120] Ibid., p. 643.

> from public international law does not cause any attenuation of its independence *vis-à-vis* its founding States."[121]

78. A new arbitration panel considered the issue of the liability of AOI and the three member States which had not challenged the interim award. The tribunal found that:

> "The States' responsibility in each individual case can be assessed only on the basis of the acts constituting the joint organization when construed also in accordance with the behaviour of the founder States."[122]

The tribunal concluded that member States had not intended to exclude their liability and that the special circumstances of the case invited "the trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States".[123] However, it appears that the final award was given only against AOI.[124]

79. The second affair which caused an in-depth discussion of the responsibility of member States originated in the failure of the International Tin Council (ITC) to fulfil its obligations under several contracts. In one of the cases before the English High Court, the plaintiffs sued the United Kingdom Department of Trade and Industry, 22 foreign States and the European Economic Community (EEC).[125] After referring to the interim arbitral award examined above and to an EEC regulation, Justice Staughton said:

> "There is thus material on which one could conclude that, both in the domestic law of some countries and in public international law, the fact that an association is a legal person is not inconsistent with its members being liable to creditors for its obligations."[126]

However, he added:

> "As it is, I reach no conclusion as to whether legal personality of an association is or is not, in international law, inconsistent with the members being liable for its obligations to third parties."[127]

He concluded instead that, according to English law, members were not liable. One of the arguments ran as follows:

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[121] Judgment of 19 July 1988, published in English translation in *International Law Reports*, vol. 80, p. 652, at p. 658. The original French texts of the judgments of the Court of Justice of Geneva and of the Swiss Federal Court can be found in *Revue de l'arbitrage*, vol. 18 (1989), p. 515 and p. 525, respectively.

[122] Paragraph 56 of the award of 21 July 1991, as quoted by R. Higgins, "The legal consequences for member States of non-fulfilment by international organizations of their obligations towards third parties: provisional report", *Annuaire de l'Institut de Droit international*, vol. 66-I (1995), p. 373, at p. 393.

[123] Ibid., p. 393.

[124] The text of the final award, which was given on 28 June 1993, was not published. The award was referred to in the judgment of the High Court of 3 August 1994, *Westland Helicopters Ltd. v. Arab Organization for Industrialization*, in *International Law Reports*, vol. 108, p. 567.

[125] *J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*.

[126] Judgment of 24 June 1987, *International Law Reports*, vol. 77, p. 55, at p. 76.

[127] Ibid., p. 77. Similar passages appear at pp. 79 and 80.

> "It seems to me that the view of Parliament [...] was that in international law legal personality necessarily meant that the members of an organization were not liable for its obligations."[128]

In a parallel case in the High Court, Justice Millett took the same approach and held that, if the member States were "to be criticized, it is not for their failure to pay the creditors directly, but for their failure to put the ITC in funds to discharge the obligations they allowed it to incur."[129]

80. The two judgements given in the High Court were the subject of appeals, which were decided jointly. In the Court of Appeal one of the majority opinions was Lord Kerr's. He noted that the legal problems arising in the case would require an "analysis on the plane of public international law and of the relationship between international law and the domestic law" of England.[130] On the first aspect he said that:

> "The preponderant view of the relatively few international jurists to whose writings we were referred, since we were told that there are no others, appears to be in favour of international organizations being treated in international law as 'mixed' entities, rather than bodies corporate. But their views, however learned, are based on their personal opinions; and in many cases they are expressed with a degree of understandable uncertainty. As yet there is clearly no settled jurisprudence about these aspects of international organizations. [...] There is no other source from which the position in international law can be deduced with any confidence."[131]

Lord Kerr held that:

> "it may well be that if an international association were to default upon an obligation to a State or association of States or to another international organization, then the regime of secondary liability on the part of its members would apply as a matter of international law. But it does not by any means follow that any similar acceptance of obligations by the members can be assumed within the framework of municipal systems of law."[132]

However, Lord Kerr's conclusion did not entirely rest on municipal law. He also stated the opinion that:

> "In sum, I cannot find any basis for concluding that it has been shown that there is any rule of international law, binding upon the member States of the ITC, whereby they can be held liable — let alone jointly and severally — in any national court to the creditors of the ITC for the debts of the ITC resulting from contracts concluded by the ITC in its own name."[133]

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[128] Ibid., p. 88.

[129] Judgment of 29 July 1987, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry*, in *International Law Reports*, vol. 80, p. 39, at p. 47.

[130] Judgment of 27 April 1988, *Maclaine Watson & Co. Ltd. v. Department of Trade and Industry; J.H. Rayner (Mincing Lane) Ltd. v. Department of Trade and Industry and Others*, in *International Law Reports*, vol. 80, p. 47, at p. 57.

[131] Ibid., p. 108.

[132] Ibid., p. 109.

[133] Ibid., p. 109.

81. Lord Ralph Gibson concurred. He observed that:

> "Where the contract has been made by the organization as a separate legal personality, then, in my view, international law would not impose such liability upon the members, simply by reason of their membership, unless upon a proper construction of the constituent document, by reference to terms express or implied, that direct secondary liability has been assumed by the members."[134]

He also noted that:

> "Nothing is shown of any practice of States as to the acknowledgement or acceptance of direct liability for any States by reason of the absence of an exclusion clause."[135]

Also the dissenting judge, Lord Nourse, gave decisive importance to the attitude taken by the member States, although he adopted the opposite presumption. He said that:

> "it is inherent in the views of the jurists and the Westland tribunal that the founding States of an international organization can, by the terms of its constitution, provide for the exclusion or limitation, alternatively no doubt for the inclusion, of their liability for its obligations; and, moreover, that such provision will be determinative of that question for the purposes of international law. Thus the intention of the founding States is paramount [...] And we must heed the importance which Shihata, like the *Westland* tribunal, would attach to the extent to which the States' intention was made known to third parties dealing with the ITC."[136]

Lord Nourse found that "the intention of the States who were parties to ITA6 [the Sixth International Tin Agreement] was that the members of ITC should be liable for its obligations"[137] and said that:

> "the ITC has separate personality in international law, but that its members are nevertheless jointly and severally, directly and without limitation liable for debts on its tin and loan contracts in England, if and to the extent that they are not discharged by the ITC itself."[138]

82. The conclusion that the majority opinions had reached in the Court of Appeal was unanimously upheld by the House of Lords. Lord Templeman rejected the idea that liability of member States would "flow from a general principle of law", noting that:

> "No authority was cited which supported the alleged general principle."[139]

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[134] Ibid. p. 172.
[135] Ibid. p. 174.
[136] Ibid., p. 141.
[137] Ibid. p. 145.
[138] Ibid., p. 147.
[139] Judgment of 26 October 1989, *Australia & New Zealand Banking Group Ltd and Others v. Commonwealth of Australia and 23 Others; Amalgamated Metal Trading Ltd and Others v. Department of Trade and Industry and Others; Maclaine Watson & Co. Ltd v. Department of Trade and Industry; Maclaine Watson & Co. Ltd v. International Tin Council*, in *International Legal Materials*, vol. 29 (1980), p. 671, at p. 674.

With regard to the alleged rule of international law imposing on "States members of an international organization, joint and several liability for the default of the organization in the payment of its debts unless the treaty which establishes the international organization clearly disclaims any liability on the part of the members", Lord Templeman found that:

> "No plausible evidence was produced of the existence of such a rule of international law before or at the time of ITA6 in 1982 or thereafter."[140]

As an additional argument the same judge held that:

> "if there existed a rule of international law which implied in a treaty or imposed on sovereign States which enter into a treaty an obligation (in default of a clear disclaimer in the treaty) to discharge the debts of an international organization established by that treaty, the rule of international law could only be enforced under international law."[141]

Also Lord Oliver of Aylmerton was not persuaded of the existence in international law of a rule providing for liability, whether "primary or secondary", of members of an international organization. He said:

> "A rule of international law becomes a rule — whether accepted into domestic law or not — only when it is certain and is accepted generally by the body of civilised nations; and it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice. It is certainly not for a domestic tribunal in effect to legislate a rule into existence for the purposes of domestic law and on the basis of material that is wholly indeterminate." [142]

83. The question of liability of member States was incidentally touched upon by the Government of Canada in relation to a claim for injuries caused by a crash of a Canadian helicopter in 1989, while it was operating in the Sinai for an organization established by Egypt and Israel, the Multilateral Forces and Observers (MFO). An exchange of letters dated 4 and 9 November 1999 between Canada and MFO contained the following passage:

> "The Government of Canada agrees that the payment of U.S. $ 3,650,000 shall constitute full and final satisfaction of, and the Government of Canada shall thereupon be deemed to unconditionally release and discharge the MFO (and through it the State of Israel and the Arab Republic of Egypt) from, any and all liability or obligation that the MFO may have in respect of the claims."[143]

One could find in this passage some support for the view that a claim could have been preferred against the two member States.

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[140] Ibid., p. 675.

[141] Ibid., p. 675.

[142] Ibid., p. 706. A few months later, the view that member States could not be held responsible because of their part in the "internal decision-making process" of the organization was maintained by Advocate-General Darmon in his opinion in the case *Maclaine Watson & Co. Ltd v. Council and Commission of the European Communities*, Case C-241/87, before the European Court of Justice. *European Court of Justice Reports*, 1990-I, p. 1797, at p. 1822 (para. 144). A settlement was reached before the Court of Justice could give its judgment on this case.

[143] Similar wording had been used in an exchange of letters dated 3 May 1990 between the Director-General of MFO and the Ambassador of the United States to Italy, relating to a claim arising form the crash of an aircraft. For further information, see A/CN.4/545, pp. 29-31 and annex.

84. Some opinions on the question of the responsibility of member States were expressed by States in connection with the current study of the Commission. In this context, the German Government recalled in its written comments that it had:

> "advocated the principle of separate responsibility before the European Commission of Human Rights (*M. & Co.*), the European Court of Human Rights (*Senator Lines*) and ICJ (*Legality of Use of Force*) and [had] rejected responsibility by reason of membership for measures taken by the European Community, NATO and the United Nations."[144]

85. In its report concerning its fifty-seventh session, the Commission had requested comments with regard to the question whether "a State could be held responsible for the internationally wrongful act of an international organization of which it is a member".[145] Only a few comments were expressed in the Sixth Committee on this point. While two statements suggested that the current draft articles should not deal with this question,[146] other statements expressed a different opinion[147] and proposed a variety of solutions. The delegation of China observed that, since the decisions and actions of an international organization were, as a rule, under the control, or reliant on the support, of member States, those member States that voted in favour of the decision in question or implemented the relevant decision, recommendation or authorization should incur a corresponding international responsibility.[148] Other delegations took the view that in principle member States were not responsible, but held that they could incur responsibility in "certain exceptional circumstances",[149] in case of "negligent supervision of organizations",[150] or "particularly with regard to international organizations with limited resources and a small membership, where each member State had a high level of control over the organization's activity".[151] Another delegation pointed out the possible relevance of "various factors".[152]

86. According to the International Criminal Police Organization (Interpol), one of the "*lex specialis* cases where the rules of an international organization specifically provide for the responsibility of a State for internationally wrongful acts of an international organization of which it is a member" would occur when "either the constituent instrument or another rule of the organization prescribes the derivative or secondary liability of the members of the organization for the acts or debts of the organization".[153] However, responsibility of States members under the rules of the organization does not imply that those States incur responsibility towards a third State unless their responsibility was made relevant with regard to that State under international law. Thus, contrary to the opinion expressed by Interpol one cannot assume, on the basis of the constituent instrument, that States members of the

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[144] A/CN.4/556, p. 65.

[145] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), chap. III, sect. C, para. 26.

[146] Statements of Morocco (A/C.6/60/SR.11, para. 43) and Argentina (A/C.6/60/SR.12, para. 80).

[147] The statement of Sierra Leone (A/C.6/60/SR.17, para. 17) stressed the "exceptional importance" of the issue.

[148] A/C.6/60/SR.11, para. 53.

[149] Statement of Italy, A/C.6/60/SR.12, para. 13.

[150] Statement of Austria, A/C.6/60/SR.11, para. 54.

[151] Statement of Belarus, A/C.6/60/SR.12, para. 52.

[152] Statement of Spain, A/C.6/60/SR.113, para. 53.

[153] Letter of January 2006, not yet published.

European Community would incur responsibility when the European Community breaches a treaty obligation. Article 300, paragraph 7, of the Treaty establishing the European Community does not intend to create obligations for member States towards non-member States.[154] As was noted in a written comment by the Government of Germany, "the article solely forms a basis for obligations under community law vis-à-vis the European Community and does not permit third parties to assert direct claims against the States members of the European Community".[155] For similar reasons, provisions that may be contained in status-of-forces agreements concerning distribution of liability between a State providing forces to an international organization and that organization cannot be regarded under international law as per se relevant in the relations with third States.[156]

87. When a treaty provides for the responsibility of member States,[157] or limits that responsibility or rules it out,[158] a special rule of international law may be established, on the assumption that the treaty provision becomes relevant in relation to a potentially claimant State.[159] Given the variety of this type of clause, it would be difficult to build an argument on the basis of this treaty practice and suggest a conclusion, one way or the other, for resolving the question of responsibility of member States.

88. Legal literature is divided on the question of whether States incur responsibility when an organization of which they are members commits an internationally wrongful act. Some authors hold member States to be responsible because they do not accept that the organization has its own legal personality or they consider that the legal personality of the organization can have legal effects only

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[154] Article 300, paragraph 7, reads as follows: "Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States." The European Court of Justice pointed out that this provision does not imply that member States are bound towards non-member States and thus may incur responsibility under international law. See judgment of 9 August 1994, *France v. Commission*, Case C-327/91, *European Court of Justice Reports*, 1994, p. I-3641, at p. I-3674, para. 25.

[155] A/CN.4/556, p. 50.

[156] For an analysis of the agreements concerning the status of forces of NATO and the European Union, see K. Schmalenbach, *Die Haftung internationaler Organisationen* (Frankfurt am Main: Peter Lang, 2004), pp. 556-564 and 573-575. See also A/CN.4/556, pp. 51-53. The model status-of-forces agreement between the United Nations and host countries (A/45/594, annex) does not contain provisions on liability.

[157] For instance, according to article XXII, para. 3 (b) of the Convention on the International Liability for Damage Caused by Space Objects of 29 March 1972, "Only where the organization has not paid, within a period of six months, any sum agreed or determined to be due as compensation for such damage, may the claimant State invoke the liability of the members which are States Parties to this Convention for the payment of that sum." United Nations, *Treaty Series*, vol. 1833, p. 396. The fact that liability of members of an organization was only provided for the benefit of States parties to the Convention was criticized by Z. Galicki in "Liability of International Organizations for Space Activities", *Polish Yearbook of International Law*, vol. V (1972-1973), p. 199, at p. 207.

[158] As an example one may quote article 24 of the International Cocoa Agreement, 2001 (TD/COCOA.9/7 and Corr.1): "A Member's liability to the Council and the other Members is limited to the extent of its obligations regarding contributions specifically provided for in this Agreement. Third parties dealing with the Council shall be deemed to have notice of the provisions of this Agreement regarding the powers of the Council and the obligations of the Members [...]".

[159] This would require the acceptance or at least acquiescence of third States.

with regard to non-member States that recognize it.[160] These views conflict with the assumption, made in article 2 of the current draft, that the organization has "its own international legal personality". Other authors maintain, on different premises, that member States are responsible if the organization fails to comply with its obligation to make reparation for an internationally wrongful act.[161] Their opinion has been opposed by several other authors who hold that, given the separate legal personality of the organization, member States do not incur any subsidiary responsibility.[162]

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[160] For this view, see I. von Münch, note 108 above, pp. 267-268; I. Seidl-Hohenveldern, "Die völkerrechtliche Haftung für Handlungen internationaler Organisationen im Verhältnis zu Nichtmitgliedstaaten", *Österreichische Zeitschrift für öffentliches Recht*, 1961, p. 497, at pp. 502-505; T. Stein, "Kosovo and the international community: the attribution of possible internationally wrongful Acts: responsibility of NATO or of its member States", in C. Tomuschat (ed.), *Kosovo and the International Legal Community: A Legal Assessment* (The Hague/London/New York: Kluwer Law International, 2002), p. 181, at p. 192.

[161] See H.-T. Adam, *Les organismes internationaux spécialisés* (Paris: Librairie générale de droit et de jurisprudence, 1965), p. 130; K. Ginther, *Die völkerrechtliche Verantwortlichkeit internationaler Organisationen gegenüber Drittstaaten* (Vienna/New York: Springer-Verlag, 1969), pp. 177-179 and 184; G. Hoffmann, "Der Durchgriff auf die Mitgliedstaaten internationaler Organisationen für deren Schulden", *Neue juristische Wochenschrift*, vol. 41 (1988), p. 585, at p. 586; C. Pitschas, *Die völkerrechtliche Verantwortlichkeit der Europäischen Gemeinschaft und ihrer Mitgliedstaaten* (Berlin: Duncker & Humblot, 2001), pp. 92-96; R. Sadurska and C.M. Chinkin, "The collapse of the International Tin Council: a case of State responsibility?", *Virginia Journal of International Law*, vol. 30 (1990), p. 845, at pp. 887-890; H.G. Schermers, "Liability of international organizations", *Leiden Journal of International Law*, vol. 1 (1988), p. 3 at p. 9; M. Wenckstern, "Die Haftung der Mitgliedstaaten für internationale Organisationen", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, vol. 61 (1997), p. 93, at pp. 108-109. I. Brownlie, in *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed., 2003), p. 655, held that "in the case of more specialized organizations with a small number of members, it may be necessary to fall back on the collective responsibility of the member States".

[162] See M. Hartwig, *Die Haftung der Mitgliedstaaten für internationale Organisationen* (Berlin/Heidelberg/New York: Springer-Verlag, 1993), pp. 290-296; P. Klein, note 15 above, pp. 509-510; A. Pellet, "L'imputabilité d'éventuels actes illicites: responsabilité de l'OTAN ou des Etats membres" in C. Tomuschat (ed.), note 160 above, p. 193, at pp. 198 and 201; I. Pernice, "Die Haftung internationaler Organisationen und ihrer Mitarbeiter — dargestellt am 'Fall' des internationalen Zinnrates", *Archiv des Völkerrechts*, vol. 26 (1988), p. 406, at pp. 419-420; J.-P. Ritter, "La protection diplomatique à l'égard d'une organisation internationale", *Annuaire français de Droit international*, vol. 8 (1962), p. 427, at pp. 444-445. Also the authors referred to in note 160 consider that member States are not responsible when the legal personality of the organization may be opposed to non-member States.

However, among these authors, some accept that responsibility can nevertheless occur for member States in exceptional cases.[163]

89. The latter opinion also found an expression in the resolution that the Institute of International Law adopted in 1995 at Lisbon on the "Legal Consequences for Member States of the Non-fulfilment by International Organizations of their Obligations towards Third Parties".[164] According to article 6 (a) of that resolution:

> "Save as specified in article 5, there is no general rule of international law whereby States members are, due solely to their membership, liable, concurrently or subsidiarily, for the obligations of an international organization of which they are members."

Article 5 reads as follows:

> "(a) The question of the liability of the members of an international organization for its obligations is determined by reference to the Rules of the organization.
>
> (b) In particular circumstances, members of an international organization may be liable for its obligations in accordance with a relevant general principle of law, such as acquiescence or the abuse of rights.
>
> (c) In addition, a member State may incur liability to a third party
>
> (i) through undertakings by the State, or
>
> (ii) if the international organization has acted as the agent of the State, in law or in fact."

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[163] Several authors held the view that an exception should be admitted when member States accept that they could be held responsible for an internationally wrongful act of the organization. In a seminal paper I.F.I. Shihata, "Role of law in economic development: the legal problems of international public ventures", *Revue égyptienne de Droit international*, vol. 25 (1969), p. 119 at p. 125, held, with regard to international companies, that "[a]ll relevant provisions and circumstances must be studied to ascertain what was intended by the parties in this respect and the extent to which their intention was made known to third parties dealing with the enterprise". With regard to members of an international organization, I. Seidl-Hohenveldern, "Liability of member States for acts or omissions of an international organization", in S. Schlemmer-Schulte and Ko-Yung Tung (eds.), *Liber Amicorum Ibrahim F.I. Shihata* (The Hague: Kluwer Law International, 2001), p. 727, at p. 739, agreed that one should likewise take "all relevant provisions and circumstances into account". P. Klein, note 15 above, pp. 509-510, considered that the conduct of member States might imply that they provide a guarantee for the obligations arising for the organization. According to M. Herdegen, "The insolvency of international organizations and the legal position of creditors: some observations in the light of the International Tin Council crisis", *Netherlands International Law Review*, vol. 35 (1988), p. 135, at p. 141, "membership alone cannot serve as an appropriate basis for an extension of claims and liabilities, unless the member States clearly intended to share the organization's rights and obligations". C.F. Amerasinghe, in "Liability to third parties of member States of international organizations: practice, principle and judicial precedent", *International and Comparative Law Quarterly*, vol. 40 (1991), p. 259, at p. 280, held that, on the basis of "policy reasons", "the presumption of non-liability could be displaced by evidence that members (some or all of them) or the organization with the approval of members gave creditors reason to assume that members (some or all of them) would accept concurrent or secondary liability, even without an express or implied intention to that effect in the constituent instrument". According to M. Hartwig, note 162 above, pp. 299-300 and M. Hirsch, note 84 above, p. 165, an injured party would have the right to claim that members fulfil their obligations to provide funds to the organization concerned.

[164] *Annuaire de l'Institut de Droit international*, vol. 66-II (1996), p. 445.

90. The general approach that was taken in the resolution of the Institute of International Law seems in line with the elements that are offered by the above analysis of practice. Apart from the interim arbitral award in the case concerning Westland Helicopters (see para. 76 above) and the minority opinion by Lord Nourse in the Court of Appeal in the Tin Council case (see para. 81 above), the decisions considered above followed the view that there exists no presumption to the effect that member States incur responsibility (see paras. 77-82 above). The same view was shared by the great majority of States: all those (over 25) that were sued in the two affairs considered in paragraphs 76 to 82 above and most of those that commented on this question in connection with the present study (see paras. 84 and 85 above).

91. One case in which States are often held to be exceptionally responsible for an internationally wrongful act committed by an organization of which they are members is when States accept to be responsible. Acceptance generally implies only a subsidiary responsibility in the event that the organization fails to comply with its obligations towards a non-member State. For instance, in his opinion in the Tin Council case Lord Ralph Gibson referred to acceptance of responsibility in the "constituent document".[165] Acceptance can also be expressed in an instrument other than the constituent act. However, as was pointed out when considering article 300, paragraph 7 of the Treaty establishing the European Community (see para. 86 above), member States would incur responsibility in international law only if their acceptance of responsibility produced legal effects in their relations with the injured non-member State. This would be most likely to occur on the basis of a treaty provision that conferred rights on third States.[166] The injured State could not sustain its claim simply on the basis of the constituent instrument, which does not bind member States in their relations with non-member States.

92. While the case of acceptance of responsibility seems straightforward, there is another case that calls for a similar solution. This is when member States, by their conduct, cause a non-member State to rely, in its dealings with the organization, on the subsidiary responsibility of the member States of that organization. Certain instances that have been envisaged in practice[167] could be covered by an exception that referred to reliance on the subsidiary responsibility of member States. One statement directly to the point was made in the arbitral award on the merits in the Westland Helicopters case. The tribunal referred to the "trust of third parties contracting with the organization as to its ability to cope with its commitments because of the constant support of the member States".[168] Various factors could be relevant when it comes to establishing whether a non-member State had reason to rely on the member States' responsibility. Among those factors one could include, as was suggested in the comment made by Belarus, "small membership"

[165] See para. 81 above. In the same paragraph there is a quotation from Lord Nourse's opinion, which also refers to the "constitution" of the international organization concerned.

[166] The conditions set by article 36 of the Vienna Convention on the Law of Treaties would then apply. United Nations, *Treaty Series*, vol. 1155, p. 331.

[167] See paras. 76, 83 and 85 above. Some of the exceptions referred to in the resolution of the Institute of International Law, quoted in paragraph 82 above, concern the same type of circumstance, while the case where "the international organization has acted as the agent of the State, in law or in fact" appears to raise a question of attribution of conduct.

[168] This passage was quoted in para. 78 above.

(A/C.6/60/SR.12, para. 52). However, one cannot assume that the presence of one or more of those factors per se implies that member States incur responsibility.

93. The two exceptions mentioned in the preceding paragraphs do not necessarily concern all the States that are members of an international organization. For instance, should acceptance of subsidiary responsibility have been made only by certain member States, responsibility could be held to exist only for those States. On the other hand, should responsibility arise for the organization as a consequence of a decision taken by one of its organs, the fact that the decision in question was taken with the votes of some member States only does not imply that only those States would incur responsibility.[169] A distinction between States which vote in favour and the other States would not always be warranted. This would reflect also a policy reason, because giving weight to that distinction could negatively affect the decision-making process in many organizations, because the risk of incurring responsibility would hamper the reaching of consensus.

94. The solution here suggested finds some support in further policy reasons. First of all, should member States be regarded as generally responsible, albeit subsidiarily, the relations of international organizations with non-member States would be negatively affected, because they would find difficulties in acting autonomously. Moreover, as has been noted, "if members know that they are potentially liable for contractual damages or tortuous harm caused by the acts of an international organization, they will necessarily intervene in virtually all decision-making by international organizations".[170] The two suggested exceptions also rest on policy reasons, because they link responsibility of member States to their conduct. Once member States have accepted responsibility or led a non-member State to rely on their responsibility, it seems fair that member States should face the consequences of their own conduct.

95. For the reasons explained in paragraph 57 above, the suggested draft article will consider only States as members of an international organization. However, as was observed by the International Atomic Energy Agency:

> "Prima facie, any potential responsibility of a State member of an international organization and of an international organization that is a member of another international organization should be treated similarly."[171]

96. The foregoing remarks lead to the conclusion that only in exceptional cases could a State that is a member of an international organization incur responsibility for the internationally wrongful act of that organization. This could be expressed in a text like the one which follows:

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[169] The importance of the circumstance of a vote in favour of the relevant decision was emphasized in the statements by China (A/C.6/60/SR.11, para. 53) and Belarus (A/C.6/60/SR.12, para. 51).

[170] R. Higgins, note 122 above, p. 419.

[171] A/CN.4/545, pp. 8-9.

Article 29

Responsibility of a State that is a member of an international organization for the internationally wrongful act of that organization

Except as provided in the preceding articles of this chapter, a State that is a member of an international organization is not responsible for an internationally wrongful act of that organization unless:

(a) It has accepted with regard to the injured third party that it could be held responsible; or

(b) It has led the injured third party to rely on its responsibility.